MAY 16
MICHAEL RODAK

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

TUSCANY FABRICS, INC.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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The petitioner, Tuscany Fabrics, Inc., prays that a writ of certiorari be issued to review the final judgment of the United States Court of Customs and Patent Appeals, entered in the office of the clerk of that court on February 17, 1972.

Opinions Below

The United States Customs Court, Second Division, entered a judgment overruling petitioner's protest of the classification of its merchandise under Item 336.50 Tariff Schedules of the United States (TSUS) on September 18, 1970. Its opinion is reproduced as Appendix I, *infra* p. 1a, and its judgment as Appendix II, *infra* p. 21a. This opinion is reported in 317 F.Supp. 741, 65 Cust. Ct. 182, C.D. 4076 (1970).

The United States Court of Customs and Patent Appeals affirmed the judgment of the Customs Court on February 17, 1972. Its opinion is reproduced as Appendix III, *infra* p. 22a. This opinion is reported in 454 F.2d 188, 59 CCPA —— (1972).

Jurisdiction

Petitioner seeks review of the judgment of the United States Court of Customs and Patent Appeals entered on February 17, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. §1256.

Questions Presented

1. Whether Headnote 7 of Schedule 3 of the Tariff Schedules of the United States violates the due process clause of the Fifth Amendment since it was enacted into law as a rider to a bill that contained more than one subject and was not expressed in the title of the bill.

2. Whether Headnote 1(ii) of Schedule 3 is void for vagueness in that the terms "significant amounts" and "peculiar characteristics or properties" are so vague and indefinite as to violate the due process clause of the Fifth Amendment.

3. Whether the statutory construction placed upon Headnote 1(ii) was clearly erroneous.

Constitutional, Statutory and Other Provisions Involved

Fifth Amendment

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

Tariff Schedules of the United States Annotated (1969)

* * *

PART 3—Woven Fabrics

A. Woven Fabrics, of Cotton

B. Woven Fabrics, of Vegetable Fibers (Except Cotton)

C. Woven Fabrics, of Wool

D. Woven Fabrics, of Silk

E. Woven Fabrics, of Man-Made Fibers

F. Woven Fabrics, of Other Textile Materials

* * *

Schedule 3 headnotes:

1. This schedule does not cover—

* * *

(ii) asbestos fibers, or yarns, fabrics, or other articles containing asbestos in significant amounts, i.e., articles in which asbestos is used in sufficient amounts to impart its peculiar characteristics or properties to the article (see part 1F of schedule 5);

* * *

7. With respect to fabrics provided for in part 3 (other than fabrics valued over $2 per pound provided for in item 337.50) and in part 4 of this schedule, provisions for fabrics in chief value of wool shall also apply to fabrics in chief weight of wool (Whether or not in chief value of wool). For the purposes of the preceding sentence, a fabric is in chief weight of wool if the weight of the wool component is greater than the weight of each other textile component (i.e., cotton, vegetable fibers except cotton, silk, man-made fibers, or other textile materials) of the fabric.

* * *

SCHEDULE 3—TEXTILE FIBERS AND TEXTILE PRODUCTS

Part 1—Textile Fibers and Wastes; Yarns and Threads

Item	*Stat. Suffix*	*Articles*	*Units of Quantity*	*Rates of Duty* 1	2
* * *					
312.50	00	Yarns, not specially provided for	Lb....	16% ad val.	40% ad val.
* * *					

Part 3—Woven Fabrics

* * *

Item	Stat. Suffix	Articles	Units of Quantity	Rates of Duty 1	Rates of Duty 2
		Other			
336.50		Valued not over $1.26⅔ per pound	....	37.5¢ per lb. +60% ad val.	50¢ per lb. +55% ad val.
• • •					
339.50	00	Woven fabrics of Textile materials, not covered by the foregoing subparts of this part: Containing over 17 per cent of wool by weight.	Sq.yd.v. Lb.	30¢ per lb. +50% ad val.	40¢ per lb. +60% ad val.
• • •					

SCHEDULE 5—NONMETALLIC MINERALS AND PRODUCTS

Part 1—Nonmetallic Minerals and Products, Except Ceramic Products and Glass and Glass Products

• • •					
518.21	00	Yarn, slivers, rovings, wick, rope, cord, cloth, tape, and tubing, of asbestos, or of asbestos and any other spinnable fiber, with or without wire, and articles of any of the foregoing.	lb....	6% ad val.	40% ad val.
• • •					

Statement of the Case

The petitioner, Tuscany Fabrics, Inc., seeks a writ of certiorari to review the judgment of the Court of Customs and Patent Appeals which affirmed the judgment of the Customs Court, Second Division, in overruling the petitioner's protest of the classification of its merchandise under Item 336.50 Tariff Schedules of the United States (TSUS).

This case involves woven fabrics in chief weight of wool and chief value of asbestos.

The Bureau of Customs classified these goods as a woven fabric of textile materials under Item 336.50 in Part 3, Schedule 3 of TSUS and compelled the petitioner to pay a rate of duty of 60% ad valorem plus 37½¢ per pound, by virtue of Headnote 7 to Schedule 3 which provides that "with respect to fabrics provided for in part 3 * * * of this schedule, provision for fabrics in chief value of wool shall also apply to fabrics in chief weight of wool."

Petitioner claims that the goods clearly fall *eo nomine* under Item 518.21 TSUS as "cloth * * * of asbestos or of asbestos and any other spinnable fiber. * * *" and therefore properly dutiable at 6% ad valorem.

The Customs Court by decision and judgment dated September 18, 1970 overruled appellant's protest, holding that it was the intent of Congress that yarns, fabrics and articles containing asbestos in insignificant amounts shall be classified under Schedule 3; that the petitioner's fabric

did not contain significant amounts of asbestos as defined by Headnote 1(ii) of Schedule 3; that in view of Headnote 7 of Schedule 3, the fabric was properly classified under Item 336.50; that Headnote 1(ii) was not unconstitutionally vague; and that Headnote 7 did not violate due process as enacted.

The Court of Customs and Patent Appeals, by decision and judgment dated February 17, 1972, affirmed the Customs Court judgment but stated in its opinion that at first blush the fabric seems to be provided for twice in the tariff schedules and that the reconciliation of the problem by the Customs Court, while not wholly free from doubt, was reasonable.

The Customs Court and the Court of Customs and Patent Appeals both read Headnote 1(ii) as a qualification to Schedule 5 treatment (in particular Item 518.21) of the petitioner's merchandise. This headnote, appearing in Schedule 3, states that Schedule 3 does not cover "asbestos fibers, or yarns, fabrics, or other articles containing asbestos in significant amounts, i.e., articles in which asbestos is used in sufficient amounts to impart its peculiar characteristics or properties to the article."

After finding that the petitioner's fabric did not contain significant amounts of asbestos, the courts below were able to withdraw the fabric from Schedule 5 consideration, even though Headnote 1(ii) of Schedule 3 is vague and indefinite insofar as it purports to establish a standard, and even though the petitioner's product did, in fact, possess the peculiar characteristics of asbestos.

Having removed the fabric from Schedule 5 treatment, the lower courts wrestled with the problem of justifying the inclusion of the fabric into Schedule 3. This was accomplished by Headnote 7 to Schedule 3, even though the petitioner argued that since Headnote 7 is, by its specific terms, limited to fabrics provided for in Parts 3 and 4 of Schedule 3, and that the fabric is plainly not within the coverage of Schedule 3, the entire basis for application of Headnote 7 is swept away. Petitioner also argued that Headnote 7 was unconstitutional as enacted since it was a rider to a bill that contained more than one subject and the title of the bill did not express the subjects of the act.

Other points were raised in the courts below, but the questions germane to this writ deal with the constitutionality of Headnotes 1(ii) and 7 of Schedule 3, and the statutory construction placed upon the tariff schedules in the courts below.

Reasons for Granting the Writ

I

Headnote 7 of Schedule 3 violates the due process clause of the Fifth Amendment for it was enacted into law as a rider to a bill containing more than one subject which were not expressed in the title of the Act.

Headnote 7 of Schedule 3 was enacted into law as a rider attached to Public Law 90-638, 82 Stat. 1359. The title of the bill as passed by Congress was "An act to amend Tariff Schedules of the United States with respect to the rate of duty on certain nonmalleable iron castings, and for other purposes." The rider, which is now Head-

note 7 of Schedule 3, dealt with woolen fabrics and had absolutely no relation to the title of the bill under which it was enacted.

This type of legislative practice, whereby a rider is tacked on to an unrelated bill, is no more than legislation by stealth, for it fails to apprise not only the petitioner but the public of proposed legislation. Indeed the legislative enactment of this bill resulted in the deprivation to petitioner of due process of law.

While there is no restriction in the Federal Constitution limiting Congress to one subject of legislation in each bill which is logically related to its title, *Hadden* v. *The Collector,* 72 U.S. 107 (1886), there is, as there always is, the requirement of due process.

In this area the states are far ahead of the Federal government; for more than forty states have provisions in their state constitutions which prevent the combining of several unrelated subjects into one bill and require that the subject be expressed in the title.

A typical state constitutional provision reads:

> "No private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." *N. Y. Const.* Art. 3, Sec. 15.

Historically, the title of an act was considered no part of it; and although it might be looked to as a guide to the intent of the lawmakers when the body of the statute appeared to be in any respect ambiguous or doubtful, yet it could not enlarge or restrain the provisions of the act

itself. 1 *Cooley, Constitutional Limitations,* 169 (1927). Titles were not used at all for more than two hundred years after Parliament began making laws. The custom of prefixing titles to statutes did not begin until about the eleventh year of Henry VII. Lord Holt said that the title was no more a part of the act than the title of a book is part of a book. In fact it was the clerks who framed the titles to the acts. So the courts relegated titles to the limbo of superfluity. This was justified in great part upon the ground that the titles were more indicative of the clerk's understanding of the proposed legislation than of the legislature. *Luce, Legislative Procedure* 545 (1922).

In adopting the common law of England, the several states adopted English procedures and attitudes towards legislative process. But the omnibus bill soon became a source of dissatisfaction in colonial America as reliance on titles in the course of legislative procedure produced damaging results. Sometimes the title deceived the legislators themselves. More often than not, the harm came from deceit of the public lulled by an apparently harmless title that in reality hid something obnoxious or iniquitous. It was an episode of this sort that caused Georgia to take the lead in constitutional precaution. At the time of the Yazoo Frauds, the act under which millions of acres of state lands were sold for a cent and a half an acre, was entitled "An Act for the Payment of the Late State Troops." The indignant people of Georgia felt betrayed and proceeded in 1798 to put in their constitution a stipulation that no law or ordinance should pass "containing any matter different from what is expressed in the title thereof."

State after state followed suit, and today more than 40 states have constitutionally provided that the subject or object of the act be expressed in its titles.

The aim of this requirement is to give the Legislature and the public fair notice of the scope of legislation. The requirement is intended to defeat deceitful, mysterious and misleading titles which foster the practices of entrapping the Legislature into the passage of provisions in the bill unrelated to and not intimated by the title of the bill, and also misleading the people as to the contents of proposed statutes.

These needs have ever been present, but they are more imperative in periods of pronounced legislative lawmaking as the present.

Headnote 7 concerns itself with the circumvention of high rate woolen fabric tariffs by combining low value reprocessed wool with other materials in such a way as to make such woolen fabrics dutiable under lower nonwool rates. It is clear that such an avowed purpose is not even hinted at in the title of the bill under which it was enacted. No doubt the woolen industry had great interest in seeing such legislation enacted. But interested parties, indeed the public in general, were not given notice of the proposed legislation. No longer are titles framed by clerks. Today the very legislators who frame the body of the law frame the title. There is no justification for a legislative process that fails utterly to apprise the public of the proposed laws under consideration. Due process of law requires such notice.

It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalog of what may at a given time be deemed the limits or the essentials of fundamental rights. *Wolf* v. *Colorado,* 338 U.S. 25, 27 (1948).

Laws should not escape laws. Since lawmaking is calculated to reach everything that does harm, lawmaking that fosters fraud and surprise and that fails to provide a means of placing interested members of the public on notice as to the subjects of legislation being considered, should be regulated. And its regulation can be accomplished easily enough by simply requiring, as do the states, that the title of an act express the subject thereof.

Unrelated Subjects

Akin to the title requirement is the requirement found in the great majority of states that no law embrace more than one subject. The history of this goes back to ancient times. In 98 B.C. the Romans enacted the *Lex Caecilia Didia* which forbade the proposal of the *lex satura*—a law containing unrelated provisions. This device compelled the people to choose between voting for something they did not approve or rejecting something they did approve. *Luce, Legislative Procedure* 548 (1922).

In the colonial assemblies of America the obnoxious practice became familiar. There is good ground for suspicion that most of the mischief was deliberately planned, in order to compel the house authorities to approve dubious items attached to proposals evidently desirable and im-

portant. As early as 1695 we find the Committee of the Privy Council complaining that the divers acts of Massachusetts were "joined together under ye same title, whereby it has been necessary for the repealing of such of them as have not been thought fit to be confirmed to vacate such others as have been comprehended under such titles." So the Privy Council forbade this practice by a standing order to the Governors. *Luce, supra* at 549-50.

The first effort to deal with the problem through constitutional means was a provision in the Illinois constitution adopted in 1818. *Ruud, "No Law Shall Embrace More Than One Subject,"* 42 Minn.L.Rev. 389 (1958).

Today more than forty states have constitutional provisions which state in effect that a bill shall not contain or embrace more than one subject.

The practice of combining several unrelated provisions under one act was for the most part a resort of special interests.

The primary and universally recognized purpose of this one subject rule is to prevent log-rolling in the enactment of laws—the practice of several minorities combining their several proposals as different provisions of a single bill and thus consolidating their votes so that a majority is obtained for the omnibus bill, where perhaps no single proposal of each minority could have obtained majority approval separately. *Ruud, supra* at 391.

Another stated purpose for the provision is to prevent "riders" from being attached to bills that are popular and

so certain of adoption that the rider will secure adoption not on its own merits, but on the merits of the measure to which it is attached. *Ruud, supra* at 391.

Another purpose served by the one-subject rule is to facilitate orderly legislative procedure. By limiting each bill to a single subject, the issues presented by each bill can be better grasped and more intelligently discussed. Also, limiting each bill to one subject means that extraneous matters may not be introduced into consideration of the bill by proposing amendments not germane to the subject under consideration. *Ruud, supra* at 391.

While it is the purpose of the title requirement to prevent legislation by stealth, the one-subject rule also aids in the eradication of this practice and complements its sister requirement.

Headnote 7 of Schedule 3 was a rider attached to Public Law 90-638. Also covered under this act were provisions relating to liquor exports and reimports, certain imports for a university and a hospital, and, of course, non-malleable cast iron parts. All of these provisions were unrelated and whether any one or all could have found approval on its own merits is a mystery. It is a mystery that is unnecessary, however, if this Court were to find that due process of law requires that an act contain no more than one subject.

Hadden v. *The Collector*, 72 U.S. 107 (1886), is the last time that this Court examined the questions brought up on this writ, and there the issue was dealt with peripherally. Other citations that discuss this principle are *United*

States v. *Lord*, 10 Alaska 626 (D.C. Alaska 1945); *Chase Nat. Bank* v. *Mobile & O.R. Co.*, 30 F. Supp. 565 (S.D. Ala. 1939).

Thus the questions of whether the one subject rule and title rule are made applicable by due process to the federal legislative process are unsettled and fresh issues for this Court to pursue, even though the rules themselves date back to ancient times.

As the Court of Customs and Patent Appeals pointed out: "It may be that the time has indeed come for the Supreme Court to re-examine such old cases as *Hadden* v. *The Collector, supra.*" *Infra* p. 25a.

Due process of law is not a fixed principle; it is a living principle. The time has come indeed for the due process requirement to be embossed upon the legislative process.

II

Headnote 1(ii) of Schedule 3 is void for vagueness in that the terms "significant amounts" and "sufficient amounts to impart its peculiar characteristics or properties" are so vague and indefinite as to violate the due process clause of the Fifth Amendment.

Headnote 1(ii) of Schedule 3 uses the phrases "significant amounts" and "sufficient amounts to impart its peculiar characteristics". These phrases are so vague and indefinite as to violate the due process clause of the Fifth Amendment. Statutes must be reasonably definite. This is a general due process requirement for all legislation whether civil or criminal. The fact that Headnote 1(ii) of Schedule 3 is not a criminal statute, or the fact that

there is no criminal penalty involved, will not save this statute from its constitutional infirmity. Vague laws in any area suffer a constitutional infirmity. *Ashton* v. *Kentucky,* 384 U.S. 195 (1966); *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966); *Small Company* v. *American Sugar Refining Company,* 267 U.S. 233 (1925).

It is established that a law fails to meet the requirement of the due process clause if it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. *Giaccio* v. *Pennsylvania, supra* at 402-3.

Headnote 1(ii) of Schedule 3 is so vague as to furnish no valid rule or standard. The headnote requires that the asbestos be used in sufficient amounts to impart the peculiar characteristics of asbestos to the imported article. It therefore purports to set a standard.

It was shown at trial, and the appellate court below affirmed the same, that the petitioner's importation did indeed possess some of the peculiar characteristics of asbestos in that the fabric with asbestos was more flame retardant and moth resistant. But the Court of Customs and Patent Appeals held that there was not *enough* difference to be commercially significant.

The importer is thus left to the Commissioner's or the Court's discretion as to what is necessary before the flame retardant and other qualities of the fiber has indeed been significantly imparted within the meaning of the statute. The statute itself does not set a reasonable standard where-

by an importer can determine whether he has complied with the statute before long and expensive legal proceedings finally resolve the question and then only on a case by case application of the headnote.

The Court of Customs and Patent Appeals conceded that this headnote "is not a model of legislative drafting" and hoped that this litigation will lead to its amendment. *Infra* pp. 27a-28a.

The lower court took notice of the fact that asbestos has a plurality of "peculiar characteristics or properties" each one of which may be imparted to a given substance at a different level of asbestos concentration. *Infra* p. 28a. The Court noting that the fact that there may be marginal cases in which it is difficult to determine whether the asbestos component was significant in the statutory sense, does not establish that the language is unconstitutionally ambiguous. Yet under the wording of this statute, all there can be are marginal cases since no standard is set forth. Where a statute is lacking in proper guidelines, it leaves open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89 (1920).

Since Headnote 1(ii) does not provide any reasonably definite guidelines for the importer to follow, but rather leaves him to the whim of the Customs Bureau, it must fall. To give judicial meaning to a vague statute after an importer has acted without being able to determine whether he has complied with the statute, does not satisfy the due process requirement of the Fifth Amendment.

III

The statutory construction placed upon Headnote 1(ii) by the lower courts is clearly erroneous.

Both the Customs Court and the Court of Customs and Patent Appeals interpreted Headnote 1(ii) of Schedule 3 as a limitation upon Schedule 5 coverage by holding that the headnote brings into Schedule 3 woven fabrics which do not contain asbestos in "significant" amounts.

Prior to the enactment of Headnote 7 there could have been no doubt that a fabric in chief weight of wool but in chief value of asbestos would have come within the purview of Schedule 5. However, the lower courts have held that unless the fabric in question is excluded by Headnote 1(ii), any fabric which is in chief weight of wool is to be classified as if it were chief value of wool.

A more reasonable and harmonious interpretation of the pertinent provisions of Schedule 3 and of Schedule 5 is that a woven fabric is classified under Schedule 5 and not Schedule 3, if it is either in chief value of asbestos or, if it is composed of a combination of asbestos and another spinnable fiber, provided that the amount of asbestos is "significant."

In this regard it is important to note that a material known as dryer felt is composed of chief weight of asbestos and chief value of nylon. At trial, petitioner's expert witness, Dr. Golub, testified to dryer felt which is used in the paper industry in the paper drying process (R. 53-4). Another material that is in chief weight of asbestos and chief

value of nylon is Nomex which is used as a mask by racing car drivers.

The significance of the existence of these two materials is that they give Headnote 1(ii) an independent meaning. No longer must the headnote be viewed as a vehicle for imposing Schedule 3 coverage on materials not already provided for in Schedule 3. Instead Headnote 1(ii) should be viewed as a limitation upon Schedule 3 coverage, for without the headnote both dryer felt and Nomex would be dutiable under Schedule 3. This then is the true import of Headnote 1(ii). It was never meant to limit Schedule 5 coverage by negative inference. It was never meant to bring into Schedule 3 articles which fell outside of that schedule to begin with. The same is true of Headnote 7 for it is directed at articles already provided for by Schedule 3.

It is clear then from the record that the lower court's construction of the headnotes was erroneous, resulting in serious damage to the petitioner.

Conclusion

For the reasons set forth herein, the writ of certiorari should be granted.

Respectfully submitted,

/s/ O. John Rogge
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APPENDICES

APPENDIX I

Decision of United States Customs Court, Second Division

UNITED STATES CUSTOMS COURT

SECOND DIVISION

[SAME TITLE]

Port of New York

Protest 70/12887-3160-70

Wool fabric

Decided Sep 18 1970

Woven fabric containing by weight approximately 70.4 percent reprocessed wool, 21.8 percent nylon and 7.8 percent asbestos, whether or not in chief value of asbestos, held properly classified under item 336.50, Tariff Schedules of the United States, as woven fabrics of wool, and not under item 518.21, as cloth of asbestos or asbestos and any other spinnable fiber, in view of headnotes 1(ii) and 7 to schedule 3.

CONSTRUCTION—CONGRESSIONAL INTENT

The entire context of a statute must be taken into account and every effort made to give full force and effect to all the language contained therein. All relevant headnotes in the tariff schedules are to be considered in determining Congressional intent.

CLOTH OF ASBESTOS—WOVEN FABRICS OF WOOL—CONSTRUCTION—CONGRESSIONAL INTENT

In view of headnotes 1(ii) and 7 to schedule 3 and the legislative history, held, it was the intent of Congress that yarns. fabrics or other articles containing asbestos in significant amounts, that is, in sufficient amounts to impart

the peculiar characteristics or properties of asbestos to the articles, should be classified in schedule 5, part 1F, but that yarns, fabrics or other textile articles containing asbestos in insignificant amounts should be classified under schedule 3, whether or not asbestos was the component material of chief value.

CONTRUCTION—CONSTITUTIONALITY

Headnote 1(ii) to schedule 3 is not in violation of the due process clause of the Fifth Amendment on the ground that the terms "significant amounts" and "sufficient amounts to impart its peculiar characteristics or properties" are vague and indefinite.

ASBESTOS IN SIGNIFICANT AMOUNTS—EVIDENCE—BURDEN OF PROOF

Where no flammability or similar tests were made on the imported merchandise nor were any comparison tests under strict control made between the imported merchandise and similar merchandise without asbestos, and the weight of the expert testimony indicates that an asbestos content of about 8 percent in a fabric containing about 72 percent reprocessed wool and 20 percent nylon was insufficient to impart its peculiar characteristics or properties to the article, held, plaintiff has not sustained its burden of proving that the merchandise contained significant amounts of asbestos so as to exclude its classification under schedule 3.

[Judgment for defendant.]

Weisman, Allan, Spett & Sheinberg (*Sydney B. Wertheimer, O. John Rogge, Richard H. Rosenberg, Richard M. Resnik* of counsel) for plaintiff.

William D. Ruckelshaus, Assistant Attorney General (*John A. Winters,* trial attorney), for the defendant.

Before RAO, FORD, and NEWMAN, Judges

RAO, Chief Judge:

The merchandise involved in this case is described on the invoice as 10 pieces of "Asbestos Products," comprised of 8 percent asbestos, 72 percent reprocessed wool and 20 percent nylon. It was assessed with duty at 60 per centum ad valorem and 37½ cents per pound under item 336.50 of the Tariff Schedules of the United States, as woven fabrics of wool, valued not over $1.26⅔ per pound. It is claimed that the merchandise is properly dutiable at 6 per centum ad valorem, under item 518.21 of said tariff schdules as cloth of asbestos or of asbestos and any other spinnable fiber.

The pertinent provisions of the tariff schedules are as follows:

Classification:

Schedule 3, Part 3, Subpart C:

Woven fabrics of wool:

* * *

Other:

* * *

Other:

336.50	Valued not over $1.26⅔ per pound	37.5¢ per lb. + 60% ad val.

Claim:

Schedule 5, Part 1, Subpart F:

518.21	Yarn, slivers, rovings, wick, rope, cord, cloth, tape, and tubing, of asbestos, or of asbestos and any other spinnable fiber, with or without wire, and articles of any of the foregoing	6% ad val.

Pertinent headnotes:

Schedule 3 headnotes:

1. This schedule does not cover—

* * *

(ii) asbestos fibers, or yarns, fabrics, or other articles containing asbestos in significant amounts, i.e., articles in which asbestos is used in sufficient amounts to impart its peculiar characteristics or properties to the article (see part 1F of schedule 5);

* * *

7. With respect to fabrics provided for in part 3 (other than fabrics valued over $2 per pound provided for in item 337.50) and in part 4 of this schedule, provisions for fabrics in chief value of wool shall also apply to fabrics in chief weight of wool (whether or not in chief value of wool). For the purposes of the preceding sentence, a fabric is in chief weight of wool if the weight of the wool component is greater than the weight of each other textile component (i.e., cotton, vegetable fibers except cotton, silk, manmade fibers, or other textile materials) of the fabric.

Part 3 [schedule 3] *headnote*:

1. This part covers all woven fabrics in the piece, of any width and with or without fast edges, including gauze and leno-woven fabrics, but does not include—

(i) any woven fabrics which are specially provided for in the provisions of part 4 of this schedule;

(ii) certain wool fabric samples (see part 7A of this schedule); or

(iii) woven fabrics in item 748.10 of part 7B of schedule 7.

It appears from the record that the merchandise is a woven fabric imported in pieces or rolls 55 to 60 yards long and 59 to 60 inches wide. It contains by weight approximately 70.4 percent reprocessed wool, 21.8 percent nylon and 7.8 percent asbestos.[1] It is used to make ladies' car-coats and semi-dressy coats.

At the outset a question of law is presented as to the intent of Congress regarding the classification of textile fabrics in part of asbestos. In view of headnote 1(ii) to schedule 3, *supra,* it is clear that if merchandise contains a significant amount of asbestos, as there defined, it is excluded from classification under schedule 3. Plaintiff claims, however, that the headnote cannot be deemed to remove from schedule 5 articles which, though not meeting the test in the headnote, are within schedule 5 by reason of being in chief value of asbestos.

The merchandise here, while in part of asbestos, is a woven fabric in chief weight of wool. It is made from a yarn composed of wool, nylon and asbestos, yarn being a textile material within the definitions in schedule 3. Headnote 1 to part 3 of schedule 3 provides that the part covers all woven fabrics in the piece, with certain exceptions not here pertinent. As originally enacted that schedule included item 339.00 covering woven fabrics of textile materials, not covered by the foregoing subparts. As amend-

1. These figures are in the testimony of Paolo Bini, manufacturer of the merchandise, and in exhibit 7, a report of an analysis by the Institute of Merchandise of the University of Bologna. Exhibit B, a report of an analysis at the U.S. Customs Laboratory, shows a content of wool 74.7 percent, asbestos 6.6 percent and synthetics with a trace of cotton 18.7 percent.

ed by Public Law 89-405, 80 Stat. 130, item 339.00 was repealed and a provision enacted providing:

> Woven fabrics of textile materials, not covered by the foregoing subparts of this part:
>
> 339.05 Containing over 17 percent of wool by weight ..... * * *
>
> * * *

This item would include the imported merchandise except for headnote 7 to schedule 3, *supra,* which provides that the provision for articles in chief value of wool shall apply to fabrics in chief weight of wool (whether or not in chief value of wool). In view of this headnote, the merchandise was assessed with duty under item 336.50, *supra.*

Plaintiff claims that this merchandise is in chief value of asbestos, is cloth of asbestos and other spinnable fibers, and is provided for *eo nomine* in item 518.21. That item, as written, includes cloth of asbestos or of asbestos and any other spinnable fiber. If read without reference to other provisions of the tariff schedules, it would cover the instant merchandise, if in chief value of asbestos, under the provision for cloth of asbestos; otherwise, under the provision for cloth of asbestos and other spinnable fibers.

However, item 518.21 cannot be read alone. It is a well-settled rule of statutory construction that the entire context of a statute must be taken into account and every effort made to give full force and effect to all the language contained therein. *Dart Export Corp. et al.* v. *United States,* 43 CCPA 64, 74, C.A.D. 610 (1956); *United States* v. *Electrolux Corporation,* 46 CCPA 143, 149, C.A.D. 718 (1959). All relevant headnotes in the tariff schedules are to be considered in determining Congressional intent. *R. H. Macy & Co., Inc.* v. *United States,* 57 CCPA , C.A.D. 988 (1970).

Schedule 3 of the tariff schedules covers most textile fibers and textile products. Headnote 1 to that schedule lists certain articles which it does not cover, including:

> (ii) asbestos fibers, or yarns, fabrics, or other articles containing asbestos in significant amounts, i.e., articles in which asbestos is used in sufficient amounts to impart its peculiar characteristics or properties to the articles (see part 1F of schedule 5);

While there is no corresponding provision in schedule 5, part 1F, the cross reference in schedule 3 is an indication that Congress intended that yarns, fabrics or other articles containing asbestos in significant amounts, as defined in the headnote, should be classified in schedule 5, part 1F, but that yarns, fabrics or textile articles containing insignificant amounts of asbestos should be classified in schedule 3. In effect, the headnote is an application of the *"de minimis"* rule to textile articles containing asbestos in amounts which do not impart the peculiar characteristics or properties of asbestos to the article. Under the *de minimis* rule a component which is a mere incident or immaterial part of the entire article, does not enhance its value, and has no commercial purpose is disregarded for classification purposes. *John S. Connor, Inc.* v. *United States,* 54 Cust. Ct. 213, C.D. 2536 (1965). Here, the standard for judging whether the amount is significant or not is set by the statute.

Plaintiff claims that a reasonable and harmonious interpretation of the pertinent provisions of schedule 3 and of schedule 5 is that a woven fabric is classifiable under schedule 5 and not schedule 3, if it is either in chief value of asbestos, or, if it is composed of a combination of asbestos and another spinnable fiber, provided the amount of

asbestos is significant. We do not so read headnote 1(ii) to schedule 3. The language indicates that it was not the intent of Congress to exclude all articles containing asbestos from schedule 3 nor those in chief value of asbestos, but only asbestos fibers, and yarns, fabrics or other articles containing amounts of asbestos sufficient to impart its peculiar characteristics or properties to the articles. The criterion is not chief value, but the characteristics or properties of asbestos imparted to the article.

A further indication of the intention of Congress as to the articles to be classified under item 518.21 is the statement in the Tariff Classification Study of November 15, 1960, prepared prior to the enactment of the tariff schedules (Schedule 5, p. 30):

> * * * These products to meet commercial standards usually contain 75 percent or more by weight of asbestos.

In this connection we note that the Standard Specifications and Tolerances for Woven Asbestos Cloth of the American Society for Testing and Materials (exhibit G) lists the grades of woven asbestos cloth beginning with a commercial grade of 75 to 80 percent asbestos and ending with grade AAAA having 99 to 100 percent asbestos.

Furthermore, when the bill adding headnote 7 to schedule 3 was before Congress, Senator Russell B. Long, Chairman of the Committee on Finance, stated (114 Cong. Rec. 27617, 29923):

> * * * In the opinion of the Committee on Finance this amendment should substantially and permanently solve the recurring problem of fabrics essentially of low-

value reprocessed wool being manipulated by foreign producers in a way to avoid the regular tariff on wool products.

* * *

* * * Under it, the wool schedules are amended to state categorically that any fabric in chief weight of wool will be dutiable at wool rates, notwithstanding the fact that some other fiber included in the fabric may be the component of chief value. This in effect provides an exception to the usual rule in the tariff schedules that classification is determined by reference to chief value. * * *

Senate Report No. 1496 on the bill (U.S. Code Congressional and Administrative News, 1968, vol. 3, p. 4584) points out two devices being used to avoid the high tariff on fabrics which were predominantly woolen. The purpose of the proposed legislation, according to the report, was to assure that any fabric which for practical purposes was a woolen fabric would be subject to duties at the wool rates and to anticipate and avoid the occurrence of tariff avoidance in this textile area.

Plaintiff's claim that headnote 7 violates the due process clause of the Fifth Amendment on the ground that it was a rider to Public Law 90-638, 82 Stat. 1359, is untenable. Said act is entitled "An Act to amend the Tariff Schedules of the United States with respect to the rate of duty on certain nonmalleable iron castings, and *for other purposes.*" [Emphasis supplied.] There is no restriction in the Constitution limiting Congress to one subject of legislation in each bill and mixed legislation is often enacted.

We conclude that it was the intent of Congress that yarns, fabrics or other textile articles containing asbestos in amounts insufficient to impart thereto the peculiar char-

acteristics or properties of asbestos should be classified under schedule 3, whether or not asbestos is the component material of chief value.

Plaintiff claims, nevertheless, that headnote 1(ii) to schedule 3 is void on the ground that the terms "significant amounts" and "sufficient amounts to impart its peculiar characteristics or properties" are so vague and indefinite as to violate the due process clause of the Fifth Amendment. We are not in accord with this view.

The "void for vagueness" doctrine is more generally applied in criminal cases where a statute fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. *Jordan* v. *De George,* 341 U.S. 223, 230 (1951); *United States* v. *Harriss et al.,* 347 U.S. 612, 617 (1954); *United States* v. *Petrillo,* 332 U.S. 1, 6 (1947). It has been held applicable to civil actions in situations requiring "the exaction of obedience to a rule or standard * * * so vague and indefinite as really to be no rule or standard at all * * *." *A. B. Small Company* v. *American Sugar Refining Company,* 267 U.S. 233, 239 (1925); *Boutilier* v. *Immigration and Naturalization Service,* 387 U.S. 118, 123 (1967).

Even in criminal cases it has been held that "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise." *United States* v. *Harriss, supra,* p. 618. The Constitution requires no more than that the language convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo, supra,* p. 8.

Whether or not the "void for vagueness" doctrine is applicable to tariff statutes, we do not find that the language challenged here sets a standard which cannot reasonably be understood by those to whom it is directed. *American Communications Assn.* v. *Douds,* 339 U.S. 382, 412 (1950); *United States* v. *Rock Royal Co-op,* 307 U.S. 533, 574 (1939).

The concept of classification on the basis of the presence or absence of an ingredient in sufficient or substantial amounts is not new to customs jurisprudence. *B. Westergaard & Co.* v. *United States,* 19 CCPA 299, T.D. 45469 (1932); *Corporacion Argentina de Productores de Carnes* v. *United States,* 32 CCPA 175, C.A.D. 304 (1945).

In the *Westergaard* case, the issue was whether certain fish balls, fish cakes, meat balls and meat cakes were classifiable under a provision for "soups, pastes, balls, puddings, hash, and all similar forms, composed of vegetables, or of vegetables and meat or fish, or both" under paragraph 773 of the Tariff Act of 1922. The only vegetable component was 3½ to 6 percent potato flour whose function was to hold the ingredients together during the cooking and sterilizing process. It was held that in view of its function the small percentage of potato flour was insufficient to give the merchandise the character of vegetables with meat and fish within the purview of paragraph 773.

On the other hand, in *Corporacion Argentina de Productores de Carnes* v. *United States, supra,* it was held that 5.8 percent of grain in dog food was sufficient to bring the merchandise within the description "an admixture of grains or grain products with * * * other feedstuffs" since the grain served a definite and satisfactory food purpose. The court stated that the quantity could not be ignored and was substantial.

Under the headnote here in issue, to take the merchandise outside schedule 3 and bring it within schedule 5, part 1F, it would be sufficient to show that the quantity of asbestos present imparted the peculiar characteristics or properties of asbestos to the imported article. Tariff acts are directed to trade and commerce and tariff terms are used in their known commercial sense, unless a contrary intention clearly appears. *Swift & Co., a Corporation* v. *United States*, 27 CCPA 181, 185, C.A.D. 83 (1939). Persons dealing with articles composed in part of asbestos can be assumed to know what the characteristics of asbestos are and whether a particular article has any of those characteristics. Thus, they are in a position to apply the standard or, where it is claimed that customs officials have misapplied it, to establish that the asbestos in the imported article has in fact imparted its peculiar characteristics or properties thereto.

Since the regional commissioner of customs classified this merchandise under item 336.50, as woven fabrics of wool, it is presumed that he found that it did not contain asbestos in a sufficient amount to impart its peculiar characteristics or properties to the fabric. The burden rests on plaintiff to overcome that presumption and establish the contrary. *Novelty Import Co., Inc.* v. *United States*, 53 CCPA 28, C.A.D. 872 (1966).

As to the peculiar characteristics of asbestos, we note that Webster's Third International Dictionary defines "asbestos" as follows:

> 1: a mineral (as chrysolite, tremolite, or actinolite) that readily separates into long flexible fibers suitable for uses where incombustible, nonconducting, or chemically resistant material is required.

In the instant case, plaintiff's witness Bino Bini, who is in the business of buying and selling raw materials for textiles and has dealt in asbestos for 3 years, testified that the principal characteristics of asbestos are that it is completely fire resistant and is not subject to moths. Samuel J. Golub, director of Fabric Research Laboratories, who also appeared on behalf of plaintiff, said it was generally mixed with more conventional fibers to produce a satisfactory yarn. He testified that it creates bulk in a fabric, adds warmth, increases fire retardancy, improves the cover or fuzzy surface of a wooly fabric, makes it more slippery to handle and adds to the weight. Defendant's witness, Julius B. Goldberg, consultant to the textile and allied industries, testified that asbestos has a very high specific gravity, has extremely fine fibers, is fire resistant, is fairly strong, and is not readily dyeable by any commercial process. Jesse L. Tucker, textile consultant, formerly with Johns-Manville, called to testify for defendant, said that asbestos is fire resistant, has good wicking characteristics, and resists destruction, although it transfers heat very readily. He also said that asbestos products are more or less bulky, although condensed and very compact.

Plaintiff does not contend that the merchandise here involved is fireproof nor that a similar cloth without any asbestos is not flame retardant or moth resistant, but that the instant merchandise containing about 8 percent asbestos is more flame retardant and more moth resistant than similar cloth without it. No one seems to have performed flammability or similar tests on samples of the imported merchandise itself. During the course of the trial one of defendant's witnesses, Richard Elliot Lutzer, assistant chief of the Fiber Section of the U.S. Customs Laboratory,

was given a piece of the merchandise for analysis, but he analyzed it for the percentages of component materials only, and performed no other tests on it.

Bino Bini testified that he had conducted tests for 3 or 4 months on various types of material and had found that when fibers are mixed with asbestos, they take longer to burn. He testified:

> I have personally conducted tests with fire to the various types of material that I have made. After repeated tests I have noticed with materials which have non-burnable qualities and those which have asbestos, with a fire of a distance of about 7 or 8 inches, those materials that do not have the asbestos will burn readily, and those with it will be retarded.
>
> • • •
>
> Q. What do you mean by retarded? A. In measuring time those materials that are composed of wool and rayon, and those materials which are composed of asbestos, the fire will follow very quickly with the material that does not have asbestos.
>
> Q. What do you mean by quickly? A. When the fibers are just mixed with rayon and wool they will burn quickly. When the fibers are mixed with asbestos it takes longer to burn.
>
> Q. How much longer? A. As a rule, it is always double. It could be 5 to 10 seconds, 10 to 20 seconds. It all depends the distance that you have the fire away from the fibers.

Since the percentages of the components in the materials tested were not stated, these tests do not establish that merchandise containing about 72 percent reprocessed wool, 20 percent nylon, and 8 percent asbestos has the peculiar characteristics of asbestos.

Dr. Golub had not tested the merchandise herein in the laboratory, but after examining it in court, testified:

> Well, it is a bulky fabric, obviously. It does have a slightly slippery hand; it has good cover. I am sure that because of the fine diameter and bulk characteristics of the fiber it has good insulating characteristics. I am also sure of the non-flammable characteristics, when you add a non-flammable material, is enhanced materially.
>
> * * *
>
> * * * Flammability depends on a great many factors. It depends on the surface of the material, the tightness of the material, the fiber composition, the weave, the twist of the yarn, and a number of other things. This is quite dense material, and it has a high wool content and nylon and asbestos in it. I am sure a cigarette would not ignite it.

He added that in his opinion it would pass the United States test for flammability for apparel fabrics, as would such fabric without the 8 percent asbestos.

This testimony, too, is inconclusive, particularly in view of the later statements of Dr. Golub as to flammability tests:

> In addition to fiber content, fabric construction affects the flammability test, fabric tightness, the fabric surface, whether it is fuzzed up or napped up; the density of the fabric, the thickness of the fabric, the construction of the yarn, and any surface finishes which might be put on as additives or manufacturing finishes. All of these can affect the flammability of the fabric.
>
> * * *
>
> The only way, in my opinion, tests of that type can be meaningful is for the test to be conducted on the fabric in question, in any asbestos, in comparison with another fabric which is a very strict control for the

test fabric. By very strict control I mean having the identical weight and tightness, the identical construction, being identical in every factor which has flammability, excepting for the content of asbestos; and unless that is done I don't think any test results can be meaningful.

Cameron Baker, director of research and development for the Better Fabrics Testing Bureau of New York City, called as a witness by plaintiff, testified that he had made a comparison test, comparing a fabric that had 8 percent asbestos with one in which the asbestos component was substituted by silk, and found that the fabric containing wool, nylon and silk was burned up fully in a vertical fire test, whereas the one containing asbestos stopped burning after 3 inches. The rate of burning was 12.2 inches per minute for the sample without asbestos and 5.8 inches per minute for the one with asbestos. This test is also inconclusive under Dr. Golub's standard. We have no way of knowing whether the presence of silk in the fabric would add to or detract from the flammability of the fabric.

Mr. Lutzer testified that based upon his experience and training it was his opinion that the asbestos content of the imported merchandise, assumed to be 8 percent, was not sufficient to impart its peculiar characteristics or properties to the fabric. His opinion was based on tests in the laboratory of similar fabrics, which burned readily. He did not believe that the asbestos added any appreciable quantity to the fire resistance of the wool itself. He did not know whether a woven fabric of wool without asbestos was more fire resistant than one with 8 percent asbestos. Mr. Lutzer had never tested for fire resistance a cloth comparable to that here involved, having 70.4 percent wool, 21.8 percent nylon, and 7.8 percent asbestos. He had, however, per-

formed flammability tests on nine fabrics containing from 4 to 9 percent asbestos. All of them burned readily and consumed themselves in from one to two minutes time. He imagined that they would pass the Federal flammability test for wearing apparel. Mr. Lutzer made no comparison tests with fabrics which contained no asbestos but believed there would be no variance in flammability. He believed they would pass the same test without asbestos.

Mr. Goldberg examined the merchandise at the trial and testified that visually and by feel, it had none of the characteristics of a mineral fiber. In his opinion a fabric containing 72 percent wool, 20 percent nylon, and 8 percent asbestos would not differ from a similar one containing no asbestos, with the possible exception of tiny specks, which might be some lighter colored or undyed asbestos fiber. It would not exhibit any of the properties identifiable with asbestos. Based on his experience with fibers, he testified that he could state with a reasonable degree of certainty that 8 percent asbestos imparted nothing of the asbestos characteristics to the fabric. In his opinion, to detect any effect on the rate of burning, there would have to be 40 to 50 percent asbestos present.

Mr. Goldberg said he had recently tested five fabrics: one all wool, and the others containing from 4 to 8 percent asbestos. Three of these had been forwarded to Mr. Goldberg by Mr. Lutzer. They contained, respectively, 71.4 percent wool, 8 percent asbestos and 20.6 percent synthetics; 71.9 percent wool, 8.9 percent asbestos, and 19.2 percent synthetics; and 72 percent wool, 4.6 percent asbestos, and 23.4 percent synthetics. One of the other two fabrics contained practically 100 percent wool and the other had an asbestos content of 6.1 percent. The witness tested the 5 pieces for flammability in accordance with the stand-

ard method for apparel and none ignited. He also subjecteed them to a forced ignition test, allowing the flame to impinge on the fabric from 25 to 30 seconds. All of the fabrics were self-extinguishing. Mr. Goldberg subjected them further to a vertical test, during which ¾ths of an inch of the fabric was in the flame for 12 seconds. The wool sample did not ignite, and the others burned from 9 to 19 seconds. He concluded that the asbestos content in the samples contributed nothing in the nature of reducing the rate of burning. He did not test the wool sample to determine whether it had any flame retardant chemicals in it.

Mr. Goldberg pointed out that wool itself is fire retardant so that adding small amounts of asbestos contributes nothing toward improving the fire retardancy of the fabric.

Mr. Tucker testified that the asbestos content in a fabric containing 72 percent wool, 20 percent nylon, and 8 percent asbestos would have no noticeable effect on the flammable characteristics of the material. The fabric would not take on the characteristics of asbestos in any way. Based on tests made over the years, it was his opinion that 20 to 25 percent asbestos would be necessary to change the feel of the material; that as much as 50 percent would be required to change the flammability of the fabric noticeably, and that 75 percent would be needed to pass the underwriters' test of flammability.

Mr. Tucker testified that asbestos has an odor but that the odor does not have an insect repellent quality. He did not think 8 percent asbestos would increase the moth resistant quality of the fabric. He explained that it had been found by other laboratories and the asbestos institute that when fibers like wool were intertwined, they, but not the asbestos, would be affected by moths.

Mr. Tucker also said that the imported merchandise was flame resistant as are all woolen fabrics, and that the addition of 8 percent asbestos would not make it any more flame resistant. It has good heat insulation because of the bulkiness of the wool fiber and both the wool and nylon have air entrapment qualities.

Dr. Golub testified in rebuttal that he had taken a photograph of a cross section of cloth having 71.6 percent wool, 20 percent nylon, and 8.3 percent asbestos and that the photograph, when enlarged, showed that while there was only 8 percent asbestos, the number of asbestos fibers was about 50 percent. The reason for this, according to the witness, was that asbestos fiber is very small in diameter by comparison with wool and nylon fiber. Because the specific gravity of asbestos is twice that of wool, he said that 8 percent of asbestos was equal in weight to 16 percent of wool. Thus, the addition of 8 percent asbestos would materially affect the weight of the fabric.

On the basis of this record, plaintiff claims that it has been shown that the addition of approximately 8 percent of asbestos imparted to the imported fabric the peculiarities of asbestos, that is, increased flame retardance, greater moth resistance, and added weight.

In our view, however, the record does not support this conclusion. None of the tests were conclusive, since none were performed on the imported merchandise nor were any comparison tests made between the imported merchandise and similar merchandise without asbestos with the controls mentioned by Dr. Golub. Furthermore, the weight of the expert testimony indicates that the asbestos content of the within merchandise was insufficient to impart its peculiar characteristics and properties to the fabric. There is no evidence that the asbestos was added for any commercial

purpose. Paolo Bini, the manufacturer of the imported merchandise, testified on behalf of plaintiff that he had experimented for 7 months before this particular type of material was put on the market; that Tuscany Fabrics was notified of the experiments and thereafter ordered the material, specifying that it contain 8 percent asbestos. Irving N. Rifkin, president of plaintiff Tuscany Fabrics, testified that he specified that asbestos be used but not what the asbestos should do to the fabric. He selected it because he liked the way it looked; it had a favorable rate of duty, and much would be sold in this country.

On the record presented, we conclude that when all pertinent provisions of the tariff schedules are read together, it is evident that it was the intent of Congress that yarns, fabrics, and articles containing asbestos in significant amounts, that is, sufficient amounts to impart the peculiar characteristics or properties of asbestos to the article, should be classified under schedule 5, part 1F, but that yarns, fabrics or textile articles containing insignificant amounts should be classified under schedule 3; that the imported merchandise does not contain significant amounts of asbestos as defined by the headnote; that it is not excluded from classification under schedule 3; that it is in chief weight of wool; that in view of headnote 7, *supra*, it was properly classified under item 336.50, as other woven fabrics of wool, not valued over $1.26⅔ per pound.

The protest is overruled and judgment will be entered for the defendant.

PAUL P. RAO
C. J.

Concurring:

Ford, J.
Newman, J.

Entry K113163 retained for appeal time.

gb

APPENDIX II

Judgment of United States Customs Court, Second Division

UNITED STATES CUSTOMS COURT

SECOND DIVISION

Suit No. 70/12887-3160-70

[SAME TITLE]

This case having been duly submitted for decision to the Second Division of the United States Customs Court, and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED: that the protest in this case be, and the same hereby is, overruled.

PAUL P. RAO
Chief Judge

MORGAN FORD

BERNARD NEWMAN

Judges of the United States Customs Court.

Dated at New York, N.Y., this the 18 day of September, 1970.

APPENDIX III

Opinion and Judgment of United States Court of Customs and Patent Appeals

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

OCTOBER TERM 1971

Customs Appeal No. 5436

February 17, 1972

[SAME TITLE]

RICH, Judge.

This appeal is from a judgment of the United States Customs Court, Second Division, 65 Cust. Ct. 182, 317 F. Supp. 741, C.D. 4076 (1970), overruling the importer's protest against the classification of the imported merchandise. We affirm.

The merchandise at bar is woven fabric concededly in chief weight of wool[1] and allegedly in chief value of asbestos. It was classified as "Woven fabrics, of wool," TSUS 336.50, by virtue of headnote 7 to schedule 3, which provides that "With respect to fabrics provided for in part 3 * * * of this schedule, provision for fabrics in chief value

1. While there was considerable controversy below over the exact composition, the Customs Court found the exportation to contain "by weight approximately 70.4 percent reprocessed wool, 21.8 percent nylon and 7.8 percent asbestos." The exact figures are important only in computing relative values; the fabric was in chief weight of wool by all measurements.

of wool[2] shall also apply to fabrics in chief weight of wool," and it is claimed as "cloth * * * of asbestos, or of asbestos and any other spinnable fiber," TSUS 518.21.

The Customs Court initially conceded that,

> If read without reference to other provisions of the tariff schedules, * * * [item 518.21] would cover the instant merchandise, if in chief value of asbestos, under the provision for cloth of asbestos; otherwise, under the provision for cloth of asbestos and other spinnable fibers.

Parenthetically, we note that item 336.50 covers the instant merchandise just as aptly, "If read without reference to other provisions of the tariff schedules * * *." The question, then, is how to harmonize two seemingly discordant provisions. This the Customs Court did by reading item 518.21 in conjunction with headnote 1(ii) of schedule 3, which excepts therefrom "asbestos fibers, or yarns, fabrics, or other articles containing asbestos in significant amounts, i.e., articles in which asbestos is used in sufficient amounts to impart its peculiar characteristics or properties to the article (see part 1F of schedule 5) * * *." It conceded that there is no corresponding provision in part 1F of schedule 5 itself, but reasoned that

> * * * the cross reference in schedule 3 is an indication that Congress intended that yarns, fabrics or other articles containing asbestos in significant amounts, as defined in the headnote, should be classified in schedule 5, part 1F, but that yarns, fabrics or textile articles containing insignificant amounts of asbestos should be classified in schedule 3.

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2. General headnote 9, Definitions, provides that, "unless the context otherwise requires," the term "of," when used between the description of an article and a material, "means that the article is wholly or in chief value of the named material * * *."

In additional support of its holding that "The criterion [for inclusion under item 518.21] is not chief value, but the characteristics or properties of asbestos imparted to the article," the Customs Court quoted from relevant portions of the Tariff Classification Study and from the legislative history of headnote 7 to schedule 3.

The court then disposed of appellant's two constitutional arguments, which were and are that the enactment of headnote 7 to schedule 3 violated the due process clause of the Fifth Amendment because it was contained in a rider which "had absolutely no relation to the title of the act under which it was enacted into law" and that headnote 1(ii) to schedule 3 is "void for vagueness." Noting that "mixed legislation is often enacted," the court held that "There is no restriction in the Constitution limiting Congress to one subject of legislation in each bill * * *." As for the "void for vagueness" argument, the Customs Court questioned the applicability of the doctrine to tariff statutes but concluded that, in any event, headnote 1(ii) sets a standard which can be understood reasonably well by those to whom it is directed and that it therefore would not be constitutionally infirm even if the doctrine were held applicable to tariff statutes.

Finally, the Customs Court indicated that among the "peculiar characteristics" of asbestos to which the statute might have reference are incombustibility, nonconductivity, high specific gravity, and resistance to chemicals and moths. Turning to the evidence on these subjects, which had been adduced by both parties, the court held that the above characteristics had not been imparted to the importations and/or increased therein relative to otherwise similar fabrics not containing asbestos.

OPINION

We will discuss the issues presented by this appeal in slightly different order than they were discussed below.

I. *Constitutionality of the Enactment of Headnote 7*

Appellant seems to be making two separate arguments on this score: First, that the text of a piece of legislation must be logically related to its title, and, second, that unrelated provisions may not be included in one piece of legislation. Appellant concedes that there are no such restrictions specifically set forth in the Constitution, but urges us to read one or both of them into the general provision of the due process clause.

Since it never has been the law that the enactment *by Congress* of mixed legislation or of legislation the substance of which is unrelated to its title is unconstitutional, see, e.g., *Hadden* v. *The Collector,* 72 U. S. 107 (1886), and since appellant's principal argument seems to be that these restrictions have been generally adopted by the several states in their respective state constitutions, this seems to be one of those cases in which it is argued that a practice, once considered constitutional, *has become* unconstitutional because of our society's increasingly demanding conception of "fundamental fairness." Cf. *Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949). It may be that the time has indeed come for the Supreme Court to re-examine such old cases as *Hadden* v. *The Collector,* supra. However, we ourselves see nothing pernicious in the practices appellant has asked

us to condemn, nor has the Supreme Court's explanation[3] for Congress's inclusion in the Organic Act of the Philippines of *express* provisions such as appellant would have us read into the due process clause persuaded us that such limitations on the power of the legislature are a necessary element of the fundamental law of every civilized country. Furthermore, we, too, are aware that Congress often passes mixed legislation and legislation which bears no relationship to its title, and we would be reluctant indeed to cast all such legislation (or, at least, all such *recent* legislation) into doubt without a far stronger showing of consensus among scholars of the law and political science than appellant has made here. Compare *Wolf* v. *Colorado*, supra, at 29-30. Accordingly, we hold that the enactment of headnote 7 of schedule 3 did not violate the due process clause of the Fifth Amendment.

II. *Constitutionality of Headnote 1(ii)*

Appellant argues that headnote 1(ii) of schedule 3, quoted supra, "does not set a reasonable standard whereby the importer can determine whether he has complied with the statute" and that it "leaves him to the whim of the Customs Bureau * * *." Although appellant makes much of the alleged indefiniteness of the term "significant amounts," that term is defined for purposes of this headnote as "sufficient amounts to impart its [i.e., asbestos's]

3. In *Posados* v. *Warner, Baines & Co.*, 279 U.S. 340 (1929), cited to us by appellant, the Supreme Court stated that

> The purpose [of provisions barring mixed legislation and legislation the subject of which is unrelated to the title] is to prevent the inclusion of incongruous and unrelated matters in the same measure and to guard against inadvertence, stealth and fraud in legislation. When bills conform to such requirements, their titles serve conveniently to apprise legislators and the public of the subjects under consideration.

peculiar characteristics or properties to the article," and it is really on the intelligibility of that phrase that appellant's arguments must stand or fall.

The Government emphasizes the word "reasonably" in the opinion below, arguing that "Absolute precision is not required" in the drafting of statutes in general and the tariff schedules in particular. Rather, to quote *American Communications Ass'n* v. *Douds*, 39 U.S. 382, 412 (1950),

> The applicable standard * * * is * * * the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important.

While the Government concedes that the controverted terms are not "absolutely precise," it argues that, "in the context herein, they are not 'so vague as to furnish no valid rule or standard' * * *."

Additionally, the Government makes two further arguments of general applicability to the Tariff Schedules. First, it argues that the "void for agueness" doctrine applies only to criminal statutes and to civil statutes providing for the exaction of a penalty.[4] Second, it argues that the Fifth Amendment's due process standards should be held inapplicable to the power of Congress to determine the terms upon which *merchandise* may enter the United States, just as it has been held inapplicable to the power of Congress to determine the terms upon which *people* may enter the United States. See *Boutilier* v. *Immigration and Naturalization Service*, 387 U. S. 118 (1967).

It may be conceded that headnote 1(ii) to schedule 3 is not a model of legislative drafting, and it may even be

4. The Government implicitly assumes that the exaction of a penalty is not to be equated with the exaction of ordinary duties or taxes.

hoped that this litigation will lead to its amendment. However, we recognize that, if the objective of headnote 1(ii) was to exclude from schedule 3 those articles in which asbestos served *any* functional role, it would not have been easy to have phrased the headnote in terms of exact proportions or a single, rigorously accurate test. There are too many variables to be considered, not the least of which is that asbestos apparently has a plurality of "peculiar characteristics or properties," each one of which may be imparted to a given substance at a different level of asbestos concentration. We have previously recognized that unreasonable precision cannot be expected in the drafting of the tariff schedules, *Amity Fabrics, Inc.* v. *United States*, 58 CCPA 73, 435 F.2d 569, C.A.D. 1006 (1970), *Arthur J. Fritz & Co.* v. *United States*, 59 CCPA ——, ——, 6 Cust. Bull. & Dec. No. 3 at 20, C.A.D. 1036 (1971), and the mere fact that there may be marginal cases in which it is difficult to determine whether amounts of asbestos were used which were "significant" in the statutory sense does not establish that the language is unconstitutionally ambiguous. Compare *United States* v. *Harriss*, 347 U. S. 612, 618 (1954), and *United States* v. *Petrillo*, 332 U. S. 1, 7 (1947). Additionally, to paraphrase the Supreme Court's language in *Harriss*, "if this classification can be made constitutionally definite by a reasonable construction of the schedules, this Court is under a duty to give the schedules that construction."

The "peculiar characteristics or properties" of asbestos which appear to be potentially relevant in cases of this sort are incombustibility, nonconductivity, high density, and resistance to chemicals, moths, and dyes. The opinion below examines appellant's evidence concerning the extent

to which the properties were added to otherwise identical cloths by the addition of the asbestos and the manufacturer's purpose in adding the asbestos. We fully approve the manner in which the lower court evaluated appellant's evidence. In effect, it held that the "peculiar characteristics or properties" of asbestos had not been imparted to an article unless the asbestos was present in sufficient quantity to serve a commercial purpose. Cf. *Varsity Watch Co.* v. *United States*, 34 CCPA 155, 162-63, C.A.D. 359 (1947), and *John S. Connor, Inc.* v. *United States*, 54 Cust. Ct. 213, 219, C.D. 2536 (1965). We think that this construction of headnote 1(ii) is a reasonable construction and that, flexible as it is, it is sufficiently definite to pass muster under the "void for vagueness" doctrine. It is, after all, quite akin to the de minimis rule and no vaguer than many other concepts with which we must deal. Thus we do not reach the Government's arguments that the draftsmen of the tariff schedules were, in any event, exempt from both the "void for vagueness" doctrine in particular and the requirements of due process in general.

III. *Harmonization of TSUS Items 336.50 and 518.21*

Whether or not appellant proved that the imports at bar were in chief value of asbestos, it seems reasonable to assume that it is possible to produce fabric which *is* in chief weight of wool and in chief value of asbestos. At first blush such fabric would seem to be provided for twice in the schedules, and it therefore was incumbent upon the Customs Court to harmonize the two competing provisions in some fashion. This it did by reading the two items in conjunction with "All relevant headnotes," as required by *R. H. Macy & Co.* v. *United States*, 57 CCPA 115, 118, 428

F.2d 856, 859, C.A.D. 988 (1970), and general headnote 9, which states that the term "of" means "wholly or in chief value of" the named material "*unless the context otherwise requires.*" (Emphasis ours.) While the result arrived at by the Customs Court is not wholly free from doubt, we think that it is reasonable in view of the express language of the schedules and is supported by the Classification Study and by the legislative history of headnote 7 to schedule 3, quoted at length in the opinion below.[5]

IV. *Effect of the Asbestos*

Accordingly, we turn to the final questions, whether there was evidence to support the lower court's resolution of the factual issues and, if so, whether its resolution thereof was clearly contrary to the weight of the evidence. *United States* v. *F. W. Myers & Co.*, 45 CCPA 48, 52, C.A.D. 671 (1958). The Customs Court held that appellant had not shown that the addition of approximately 8% asbestos to a woven fabric otherwise consisting of wool and nylon in the ratio of 3.6 to 1 by weight had served any commercial purpose.

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5. The Government also argues that

> Assuming, *arguendo*, that by incorporation of General Interpretative Rule 9(f)(i) into item 518.21, and by incorporation of headnote 7 into item 336.50, the competition were between "cloth in chief value of asbestos" and "woven fabrics in chief weight of wool," the weight criterion of item 336.50 "provides for the article with the greatest degree of accuracy and certainty" (*United States, etc.* v. *Simon Saw & Steel Co.*, 51 CCPA 33, 41, C.A.D. 834 (1964)), and "woven fabrics" is more specific than "cloth" since "cloth" is a generic term which encompasses "a woven, knitted or pressed fabric * * *." *Webster's New World Dictionary*, College Edition (1962), p. 276.

While we do not find it necessary to rely on this argument, we think it has considerable merit and might well have carried the day for the Government even in the absence of other considerations present here.

Appellant argues that "The record shows that a fabric with 8% asbestos is more flame retardant and moth resistant than a similar cloth without any asbestos content" and that "the addition of 8% asbestos substantially increases the weight of the fabric and lends greater heat resistance and insulation to the fabric." We think that, at least with respect to flame retardance and moth resistance, these statements are probably accurate. However, the question is not whether the addition of the asbestos made *any* difference; it is whether the addition made *enough* difference to be commercially significant. On that point there is ample evidence, set forth at length in the opinion below, that the addition of the asbestos was not commercially significant except insofar as it arguably entitled the importations to a much lower import duty than otherwise identical cloth without the asbestos would have been entitled to. Indeed, we are left with the strong impression that the possibility that this cloth would be entitled to the lower duty rate provided for "cloth * * * of asbestos" was the sole reason that the asbestos was used in the cloth. While there is nothing morally reprehensible about arranging one's affairs so as to minimize customs duties, the possibility of obtaining a lower rate is not itself a "commercial purpose" such as is involved here. Appellant has not persuaded us that the Customs Court erred in holding that the asbestos in these importations served no other "commercial purpose." Accordingly, the judgment below is *affirmed.*

AFFIRMED

Baldwin, J., concurs in result only.
Worley, C. J., took no part in the decision of this case.